IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

PETITIONERS' BRIEF ON THE MERITS

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512/475-4638

Counsel for Petitioners

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PETITIONERS' BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Jerome D. Chapman, Commissioner of the Texas Department of Human Resources, et al., successors in office to Defendants-Appellees below, respectfully submit this their Brief on the Merits.

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Texas granting your Petitioners' (Defendants below) motion for summary judgment is reproduced in Appendix A to the Petition

for Writ of Certiorari and is reported at 391 F.Supp. 223 (S.D. Tex. 1975). The Opinion of the Court of Appeals for the Fifth Circuit reversing the District Court is reproduced in Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on July 13, 1977, and a rehearing was denied on August 22, 1977 (Appendices C and D, respectively, to the Petition for Writ of Certiorari). The Petition for Writ of Certiorari was filed on November 21, 1977, and granted on February 21, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) because the Opinion of the Court of Appeals for the Fifth Circuit conflicts with decisions of three other circuits as to jurisdiction, conflicts with prior decisions of this Court, and intrudes into an area of state discretion previously explicitly recognized by this Court.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

United States Constitution, Article 6, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any

> State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 601 provides:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent

children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Due to its substantial length, 42 U.S.C. § 602 of the Social Security Act is included herein as Appendix E to the Petition for Certiorari.

45 CFR § 233.90(a) (1976) provides in pertinent part:

In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent . . . will be considered available for children in the household in the absence of proof of actual contribution.

QUESTIONS PRESENTED FOR REVIEW

I.

Does 28 U.S.C. § 1343(4) give federal courts jurisdiction over an action asserting that Texas' Aid to Families With Dependent Children Program failed to comply with federal requirements, under statute providing federal

jurisdiction to recover damages or to secure equitable or other relief under civil rights laws?

II.

(A) Does the decision of the Court of Appeals for the Fifth Circuit holding that Texas must recalculate its standard of need in the Aid to Families With Dependent Children Program conflict with this Court's prior ruling specifically upholding same in *Jefferson v. Hackney*, 406 U.S. 535 (1972)?

(B) Did the Court of Appeals misinterpret this Court's ruling in *Van Lare v. Hurley*, 421 U.S. 338 (1975), to apply to a state's calculation of its standard of need in addition to determinations concerning available income?

III.

Did the decision of the Court of Appeals for the Fifth Circuit intrude into the calculation of a standard of need in a state's Aid to Families With Dependent Children Program, an area explicitly reserved to the states by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra?*

STATEMENT OF THE CASE

The facts are adequately set out in the opinions below and are only briefly summarized here.

The State of Texas participates in the Aid to Families With Dependent Children Program which is administered through its Department of Human Resources, formerly the Department of Public Welfare. Prior to March 1, 1973, Texas defined three categories

in establishing its standard of need in this financial assistance program (personal needs allowance, shelter allowance and utilities allowance) with ceilings in each. The sum of the amounts determined under each category calculated for the family unit was the "standard of need." Due to the limited availability of funds, a percentage reduction factor of 75% was applied to the standard of need and payments were made to each recipient in the reduced amount, less any income received other than the Aid to Families With Dependent Children grant.

On March 1, 1973, Texas consolidated the above allowances into one need figure determined by the size and composition of the household. The 75% percentage reduction factor was retained.

Both before and after the March 1 consolidation Texas prorated a recipient's shelter and utility expenses in calculating the standard of need if one or more noneligible individual(s) resided with the recipient. This proration has traditionally been made in order to take advantage of economies of scale and to prevent the State's limited financial resources available for Aid to Families With Dependent Children from being diverted to the benefit of ineligible persons. Economies of scale exist as household size increases; and if Texas allowed the "needs" of ineligible persons to be added to the needs it recognizes for eligible persons living in the same household, the obvious effect would be to increase the total level of financial assistance to a sum sufficient to satisfy their combined needs, even though some of the individuals living in the household are admittedly ineligible. It is this proration policy which was upheld by the District Court but overturned by the Court of Appeals, even though the policy had not been changed in the March 1, 1973, revision which prompted the litigation. Both Courts found federal jurisdiction to

exist pursuant to 28 U.S.C. § 1343(4).

SUMMARY OF THE ARGUMENT

The determination of the Court of Appeals for the Fifth Circuit that there is jurisdiction in the instant cause pursuant to 28 U.S.C. § 1343(4) conflicts with the decisions of three other circuits. The Fifth Circuit erroneously ruled that an alleged statutory conflict between a state regulation and the Social Security Act, absent any substantial constitutional claim, was sufficient to confer jurisdiction.

The Fifth Circuit decision on the merits was that Texas' proration of shelter and utilities violates the cost-of-living increase requirement of 42 U.S.C. § 602(a)(23), even though Texas indisputably did make a cost-of-living adjustment pursuant to that statute which was applied to all items included in the standard of need and was previously upheld by this Court in *Jefferson v. Hackney, supra,* at 543-544.

To reach this wholly unwarranted result the Fifth Circuit misinterpreted this Court's opinion in *Van Lare v. Hurley,* 421 U.S. 338 (1975), and applied its holding regarding the contribution of unverified *income* to Texas' budgetary standard of need, an entirely different process governed by different requirements of the Social Security Act, 42 U.S.C. § 601 *et seq.*

Finally, the Fifth Circuit decision intrudes into the calculation of the standard of need in Aid to Families With Dependent Children, an area of discretion explicitly reserved to the states' policy-making process by the Social Security Act and this Court in *Jefferson v. Hackney, supra; Dandridge v. Williams, supra;* and *King v. Smith,* 392 U.S. 309 (1968).

ARGUMENT

I.

THE COURTS BELOW ERRONEOUSLY ASSUMED JURISDICTION PURSUANT TO 28 U.S.C. § 1343(4).

Since this Court's decision in *Hagans v. Lavine*, 415 U.S. 528 (1974), there has continued to be substantial question as to federal court jurisdiction over allegations that state regulations conflict with a federal statute and must be overturned due to the Supremacy Clause. U.S. Const., Art. 6, Cl. 2. In the instant cause it is alleged that Texas' traditional policy of prorating shelter and utility factors in establishing its "standard of need" in the Aid to Families With Dependent Children Program (A-19 in Petition for Writ of Certiorari) violates the cost-of-living increase requirement found in the Social Security Act at 42 U.S.C. § 602(a)(23). Both Courts below found only a statutory claim and specifically did not find a constitutional claim; therefore, the constitutional argument will be addressed herein only to the limited extent necessary to understand the statutory claim. (A-8 & 9, B-30 in Petition for Writ of Certiorari).

Simply stated, 28 U.S.C. § 1343(3) provides federal jurisdiction to claims based upon the Constitution or federal statutes ". . . providing for equal rights . . ." while 28 U.S.C. § 1343(4) provides jurisdiction to claims based upon federal statutes "... providing for the protection of civil rights ...." This Court has previously indicated that the Social Security Act is not a statute providing for "equal rights" in *Aguayo v. Richardson*, 473 F.2d 1090, 1101, cert. den. sub nom. *Aguayo v. Weinberger*, 414 U.S. 1146 (1974). This view has been followed in *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974) and *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975). Despite the clear language of the above cases and the findings of both Courts below that there is no constitutional claim in the instant cause, Respondent does argue that it attempted to state a constitutional claim premised upon the Supremacy Clause. Petitioner would simply observe that the Supremacy Clause has been held not to "... secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate." *Gonzales v. Young*, 560 F.2d 160, 166 (3rd. Cir. 1977); *Andrews v. Maher, supra*, at 118-119.

The jurisdictional dispute in this cause is whether, in the absence of a substantial constitutional claim such as that in *Hagans v. Lavine, supra*, 42 U.S.C. § 1983 gives rise to a "right" cognizable under 28 U.S.C. § 1343(4). Stated another way, the issue may be viewed as one of whether 42 U.S.C. § 1983 may be used to vindicate a "statutory right" arising under the Social Security Act as an Act of Congress" ... providing for the protection of civil rights ...." Petitioner urges that the answer to these questions is "No" and that *Gonzales v. Young, Andrews v. Maher*, and *Randall v. Goldmark, supra*, all correctly so determined.

It should be noted that 42 U.S.C. § 1983 was read by the Fifth Circuit in *Gomez v. Florida State Employment Service*, 417 F.2d 569, 580 n. 39 (5th Cir. 1969), as an Act providing for the protection of "civil rights" cognizable under 28 U.S.C. § 1343(4); yet, subsection (4) was added to § 1343 and then only as a technical amendment in the Civil Rights Act of 1957. Congress did not intend to affect or expand the jurisdictional scheme and expressly stated that "These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by

the preceding section of the bill." House Report No. 291, April 1, 1957, *U.S. Code Cong. and Admin. News*, page 1976. The Fifth Circuit's alteration of 42 U.S.C. § 1983 from a statute which fashions remedies into a jurisdictional statute is warranted by neither the legislative history nor public policy. Other policy aspects of this particular cause will be addressed in later sections of this brief; still even without further discussion of policy, the law is clear that there is no fundamental right to welfare and to fabricate a statutory "right" under 42 U.S.C. § 1983 is, as the Third Circuit described it, a "chicken-and-egg approach." *Gonzalez v. Young, supra*, at 168; *Burns v. Alcala*, 420 U.S. 575 (1975). There simply was no Social Security Act when 42 U.S.C. § 1983 was passed as the Civil Rights Act of 1871 and not even the Fifth Circuit has held since that time that welfare is a "right." *Gonzales v. Vowell*, 490 F.2d 475 (5th Cir. 1974).

In summary, Petitioner does not dispute that including a substantial constitutional claim would allow a plaintiff to litigate a statutory claim pursuant to pendent jurisdiction as interpreted by *Hagans v. Lavine, supra*. Petitioner does assert that the Courts below incorrectly assumed jurisdiction over the statutory 42 U.S.C. § 1983 claim in the absence of any constitutional claim; and, alternatively, that even if Respondent is found to have a Supremacy Clause claim, it does not present a "substantial" constitutional claim for jurisdictional purposes.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

A. The Fifth Circuit Decision Contravenes *Jefferson v. Hackney*.

In its reversal of the District Court's decision that Texas complied with 42 U.S.C. § 602(a) (23) as to the proration issue the Fifth Circuit ignored this Court's holding in *Jefferson v. Hackney, supra* (B-35 to 40 in Petition for Writ of Certiorari). In *Jefferson* this Court specifically determined that Texas was in compliance with the requirements of Subsection (23), citing *Rosado v. Wyman*, 397 U.S. 397 (1970), and held that there were two broad purposes to the requirement:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

This Court then went on to find that "Texas has complied with these two requirements." *Jefferson v. Hackney, supra*, at 543-544. Nevertheless, the Fifth Circuit overturned the District Court's determination, based on *Jefferson v. Hackney, supra* (A-17 to Petition for Writ of Certiorari), and in effect, if not in literal language, found Texas in violation of 42 U.S.C. § 602(a) (23). Petitioner would again emphasize that this action was taken absent even a rudimentary analysis of the import of *Jefferson v. Hackney, supra*, and, in fact, without mentioning it. It is mentioned later in the Fifth Circuit opinion (B-42 to 45 in Petition for Writ of Certiorari) when that Court discusses Texas' consolidation to a flat-grant system, but there it is noted that Texas complied with 42 U.S.C. § 602(a) (23) requirements, citing *Jefferson v. Hackney, supra*.

The erroneous distinction implicit in the Fifth Circuit's reasoning is that on the one hand Texas has latitude in "pricing" and "averaging" items to be included in its standard of need (B-43 to Petition for

Writ of Certiorari) but cannot decide what costs should be included or excluded in the first place (B-39 to Petition for Writ of Certiorari). The interpretation has the obvious result of removing a state's discretion to establish its own standard of need as provided by 42 U.S.C. §§ 601 and 602(a) because it requires a state to include items of need in its calculations which, as a matter of public policy, it does not choose to provide, i.e., shelter and utilities for *ineligible* persons. The Fifth Circuit has simply substituted its judgment for that of the State.

Texas is aware that the Fifth Circuit formally premised its decision on a Department of Health, Education and Welfare regulation found at 45 CFR § 233.90(a) (1976); however, if that regulation is the sole basis for the decision, rather than a specific statutory provision, then the answer to the jurisdictional issue herein must surely be in the negative. A regulation standing alone, whatever its content, is not a statute providing for "civil rights." It is not a statute at all and does not furnish even a colorable basis for federal jurisdiction under 28 U.S.C. § 1343(4). Texas disputes the Fifth Circuit's conclusion that it is not in compliance with the regulation on the same basis that it argues that it is not out of compliance with the requirements of the Social Security Act, and further states that the Department of Health, Education and Welfare regulation was not even in effect in 1973 when the challenged actions occurred.

B. The Fifth Circuit Decision Misinterprets *Van Lare v. Hurley.*

The stated justification for the Fifth Circuit's reversal of the District Court is this Court's decision in *Van Lare v. Hurley, supra,* which was entered after the District Court decision (B-35 to Petition for Writ of Certiorari). The message of *Van Lare* and preceding cases, *Lewis v. Martin,* 397 U.S. 552 (1970), and *King v. Smith, supra,* however, is clear. Texas cannot presume a contribution of *income* that is unverified simply because an alleged "substitute father," "adult male person assuming the role of spouse," "non-adopting stepfather," or "lodger" is present in the Aid to Families With Dependent Children recipient's home. That is not what the Texas policy does.

The New York regulation overturned by this Court in *Van Lare v. Hurley, supra,* addressed the application of unverified "income and resources" in determining Aid to Families With Dependent Children eligibility. The Texas policy, on the other hand, speaks only in terms of budgeting a standard of need and the item(s) to be included therein. The objectionable feature of the New York regulation was a presumption of income available to the Aid to Families With Dependent Children recipient. Texas' policy is totally devoid of any mention of income and is determined without regard to any income calculations, whether presumed, unverified, or otherwise. It deals only with the budgetary needs of the family.

The process of determining the Texas Aid to Families With Dependent Children recipient's grant went through at least four stages prior to March 1, 1973: (1) the maximum standard of need was established, (2) the number of eligible recipients and the budgetary standard of need was established, not to exceed the maximum, (3) the recognized standard of need was ascertained by application of the percentage reduction factor of 75%, and (4) an amount of non-exempt income was established and deducted from the recognized standard of need to obtain the amount of the grant. The Texas proration factor operated at the second level and did not involve a presumption of income. The New York regulation operated at the fourth level, involving an income calculation, and did involve a presumption of income.

The difference in the two policies can be succinctly shown by considering the effect on eligibility a non-contributing "lodger" who earns $10,000.00 per month would have on an applicant. The New York regulation would presume the $10,000.00 was available and being used to satisfy the needs of the applicant's family, rendering them ineligible even though the "lodger" in fact contributes nothing to their support nor is he or she legally obligated to do so. The Texas regulation does not even consider the $10,000.00 per month income of the lodger and treats this particular non-contributing "lodger" the same as any other. The shelter and utility expenses are pro-rated and a grant is initiated, albeit in a slightly smaller amount than would be the case if the "lodger" were not there taking up space.

As unlikely as the above example may seem it does serve to demonstrate the distinction between the New York and Texas policies. The fact that there may be few Aid to Families With Dependent Children applicants who live with a lodger who has a $10,000.00 per month income does not affect the example's validity, because the result is the same *regardless* of the amount of his or her income. The $10,000.00 per month figure only serves to highlight the very substantial and fundamental distinction between a state's process of establishing a standard of need, as Texas has done, and unverified assumptions as to the availability of income as instituted by New York.

III.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT INTRUDES INTO AN AREA OF STATE DISCRETION.

Calculation of a standard of need in the Aid to Families With Dependent Children Program is a matter

within each state's discretion. 42 U.S.C. §§ 601 and 602. *Jefferson v. Hackney, Dandridge v. Williams*, and *King v. Smith, supra.* In fact, probably the most frequently overlooked legislative language regarding Aid to Families With Dependent Children may be found at 42 U.S.C. § 601, wherein it is provided that the Program is "For the purpose of *encouraging* the care of dependent children . . . *by enabling each State* to furnish financial assistance and rehabilitation and other services, as far *as practicable under the conditions in such State* . . . (emphasis added)."

Texas' position is that in establishing its standard of need it is determining a condition of eligibility, ("need") and that it is free to restrict eligibility, if that be the effect of its long-standing proration policy, unless Congress has acted to forbid the restriction. There is no Congressionally enacted restriction applicable to this cause. Quite the opposite, there is the previously cited Congressional authorization for Texas to set its own standard of need by its own policy choices.

This state discretion was recognized by this Court in the landmark case of *King v. Smith, supra*, at 334, which held that states have ". . . undisputed power to set the level of benefits and the standard of need . . . ." Making the point even more clearly, this Court said at 318 "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need . . . ."

The Texas policy of not including shelter and utility "needs" of ineligible persons in its Aid to Families With Dependent Children standard of need is as permissible and complimentary a policy as those upheld by this Court in *New York Department of Social Services v. Dublino*, 413 U.S. 405 (1973) and *Wyman v. James*, 400 U.S. 309 (1970). The purpose of all such policies is to

ensure that state funds are expended only on behalf of *individuals who the state determincs are needy* (and who also meet the federal "categorical relatedness" requirement, i.e., an Aid to Families With Dependent Children child must be "deprived of parental support" as well as needy). The policies in the above cases take different approaches to different aspects of the problem, but all address the same fundamental issue in a way the particular state determines to be appropriate.

It should be undisputed that Texas has great latitude in dispensing its available funds and that federal law does not prevent it from balancing the stresses which uniform insufficiency of payments imposes on all Aid to Families With Dependent Children families by considering in computing need the comparatively greater ability of larger families to accomodate their needs to diminished per capita payments because of inherent economies of scale. *Dandridge v. Williams, supra*, at 542-544. The policy judgment being defended in this litigation is of exactly that nature. The only distinction is that, in a very limited manner, it extends far enough beyond the eligibile Aid to Families With Dependent Children family unit to recognize the existence of an ineligible person in the same household. To do otherwise is to be blind to reality, a burden a state does not knowingly assume when choosing to participate in the Aid to Families With Dependent Children Program. Given the fact that Texas' proration policy operates within an area of permissible state discretion, a federal court should not undertake to substitute its view of what the policy ought to be even if it thinks the state policy is ill-advised or even simply wrong. This is exactly what the Fifth Circuit has done and is why its decision should be overturned.

CONCLUSION

This Court should rule that neither the Social Security Act nor 42 U.S.C. § 1983 *creates* any *rights* enforceable in federal court pursuant to 28 U.S.C. § 1343(3) or (4) and reverse the decision of the Court of Appeals for the Fifth Circuit remanding the case with instructions to dismiss the Complaint. Alternatively, the Court should reverse the decision of the Court of Appeals for the Fifth Circuit and affirm the decision of the District Court on the merits for the reasons heretofore stated.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

Attorneys for Petitioner

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512/475-4368

CERTIFICATE OF SERVICE

I, DAVID H. YOUNG, Assistant Attorney General of Texas and a member of the Bar of the Supreme Court, do hereby certify that three copies of the foregoing Brief for Petitioner have been served on Respondents by placing same in the United States Mail, certified, postage prepaid, addressed as followes: Mr. Jeffrey J. Skarda, 2912 Luell Street, Houston, Texas 77093 and to Mr. John Williamson, Texas Rural Legal Aid, 305 E. Jackson Street, Suite 122, Harlingen, Texas, 78550, on this ___ day of _____, 1978.

DAVID H. YOUNG
Assistant Attorney General